



# Understanding and Preventing Financial Exploitation of Vulnerable Older Adults

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To download a PDF version of this publication, visit  
<http://www.nycourts.gov/courts/family-violence/PDFs/monograph.pdf>

# Dear Colleagues,

The American population is rapidly aging. According to the U.S. Census Bureau, by 2030 people 65 years and older will make up more than 20 percent of the population. One result of this demographic trend is that judges and other legal professionals are more often encountering older adults in the cases they handle. The trend extends far beyond guardianship petitions.

Indeed, issues involving older adults arise in all courts. The fates of older adults at risk of eviction are being decided in Housing Courts. Family Courts are handling cases in which children are living with elderly relatives. Surrogate's Courts are called upon to decide whether an older adult was of sound mind when executing a contested will. Supreme Courts are adjudicating matrimonial actions where one or both parties are of an advanced age and confronting questionable decision-making capacity, undue influence and fraud in various other legal transactions. Criminal Courts are handling a large and growing number of cases involving elderly victims of abuse—physical, emotional, and most common of all, financial. The number of older criminal defendants is also on the rise.

On May 1st of this year, my office hosted a daylong symposium at the New York State Judicial Institute entitled Financial Exploitation of Older Adults. It's a problem much more prevalent than many people realize and one that can have truly tragic consequences. Financial exploitation affects an estimated 1 out of 24 older adults, and while we don't tend to associate theft with deep suffering, that is the outcome in many cases.

**Financial exploitation is not only an urgent problem in its own right, it's also a useful lens for legal professionals to understand the aging process.**

Older victims often cannot recover financially, and as a result, can lose their homes, access to quality personal and medical care, and the most prized of all possessions, their independence. Financial exploitation also undermines an older person's self-confidence and trust in others, especially when the person who stole from them is a relative, friend or familiar caregiver. Moreover, theft can lead to other types of abuse. Legendary actor Mickey Rooney broke down crying while testifying before Congress about how his stepson stole from him and concealed the abuse by controlling every aspect of Rooney's life. And it is difficult to forget the highly-publicized case of Brooke Astor, the wealthy New York philanthropist suffering from Alzheimer's disease, who was financially exploited by her son and a trusted lawyer, both of whom were ultimately convicted of defrauding Mrs. Astor and stealing tens of millions of dollars from her.

Financial exploitation is not only an urgent problem in its own right, it's also a useful lens for legal professionals to understand the aging process, why many older adults are more vulnerable to harm, and equally true, the fact that adults with diminished capacities can still make some decisions for themselves. Our May 1st symposium took place on National Law Day, and I can't think of a more important issue to explore in the context of the 14th Amendment to the Constitution, this year's Law Day theme. The rights to full citizenship, due process and equal protection under the law do not diminish as a person ages. Neither does the fundamental human right to be free from abuse, as federal Deputy Assistant for Aging Edwin Walker noted in his keynote address.

As judges and other legal professionals, we should recognize the detrimental effects of ageism and emphasize the role of older adults as valued members of our communities, entitled to the same rights and protections as anyone else. In our everyday work that may mean protecting a vulnerable older person from harm or upholding an older person's right to make life decisions. Often, we're called upon to do both in complex cases in which the stakes are high. To succeed we have to arm ourselves with knowledge about the law, as well as the particular cohorts these laws exist to protect and empower.

I hope this publication culled from information provided during the symposium illuminates the serious problem of financial exploitation among older Americans. I also hope it breaks myths or misunderstandings you may have about older people in ways that enable you to use all the legal tools at your disposal to achieve justice in the cases you handle.



Deborah A. Kaplan  
*Statewide Coordinating Judge for Family Violence Cases*

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# Financial Exploitation: What Is It?

Financial exploitation, as defined under New York State Social Services Law, Section 473 (6)(g), is the improper use of an adult's funds, property, or resources by another individual. It includes, but is not limited to, fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers, and denial of access to assets, all of which are crimes under the law.

*A Bankers Life and Casualty insurance agent in Washington State cultivated social relationships with several older clients and when their annuities matured convinced them to "reinvest" the proceeds with her, stealing more than \$1 million dollars that should have supported these individuals throughout retirement.*

*Over the course of a single week, a 58-year-old woman met and married a 72-year-old man with terminal cancer and Alzheimer's Disease and then gained sole control of both his bank account and pension fund.*

*In the wake of Hurricane Sandy, an untold number of homeowners, many of them seniors, were taken advantage of by unscrupulous contractors whose work was shoddy, incomplete or who took a deposit and never showed up at all.*

*An 87-year-old widow was robbed of \$217,000 by a woman she viewed as a friend and who had promised to pay back a series of "loans." She lost her home as a result.*

*A 72-year-old man fled his apartment after his son, who forced him to sign a power of attorney, threatened his physical safety.*

These true accounts of financial exploitation illustrate a few salient trends in a phenomenon that affects millions of older Americans every year.

- First, having had a lifetime to acquire and save, older adults tend to possess more financial assets and property than younger people, making them attractive targets for financial exploitation.
- Although stranger scams are on the rise and sometimes cause significant losses, older adults are even more likely to be financially exploited by someone they know: a family member, friend, neighbor, or trusted caregiver or service provider. In a 2016 study conducted by the New York State Office for Children and Family Services, family members were identified as perpetrators in 67% of verified cases.
- In that same study of reported cases in New York, half of all victims had a physical impairment, and a third had a diagnosis of dementia or other pronounced cognitive impairment. A striking 58% of victims studied in New York State did not fully comprehend that their money or valuables had been stolen. Thus, it is clear that older adults with significant mental and physical impairments are especially vulnerable to financial exploitation.
- Financial exploitation often involves coercion, even if the situation doesn't appear so at first glance. Perpetrators use an array of tactics to manipulate and control their victims to get what they want. Moreover, when financial exploitation occurs in the context of a relationship, the abuse is likely to grow worse over time and extend beyond theft. Stealing often begets emotional abuse and neglect, and can lead to physical harm as well.
- Being exploited by someone an older adult depends on for care or support can diminish that person's ability and/or willingness to seek help and report abuse.
- While cases involving wealthy individuals capture media attention—at age 98 the heiress Huguette Clark abruptly changed her will, leaving her long-time private nurse \$30 million dollars and nothing to her heirs—most victims are cheated out of ordinary sums of money that nevertheless can cause extraordinary deprivations in their lives. Financial exploitation can be a gateway to poverty, increasing the odds that an older adult will end up on public assistance—a cost we all bear—and even die prematurely. Research shows that moderate wealth is a predictor of longevity, while poverty has the opposite effect.
- Elder abuse of all kinds, including financial exploitation, is a risk factor for major depression, other illness, and hospitalization.
- Perhaps the most important trend to understand is that financial exploitation of older adults is on the rise. Adult Protective Services (APS) in New York documented a 35% jump in reported cases between 2010 and 2014, which is one of the reasons the state invested in a more in-depth study of the problem. And for every case that comes to the attention of authorities, many more are undetected (see "Under the Radar, but Widespread and Costly" on page 6).

**THE TAKE-AWAY:** By understanding financial exploitation—especially the risk factors and warning signs listed below—it’s possible to prevent or halt abuse and in some cases recover lost assets. Moreover, legal professionals and others can take measured steps to protect at-risk adults from being exploited while at the same time respecting their rights to independence and self-determination. Keep in mind: Cases that initially appear straightforward may involve some form of financial abuse or the potential for it.

## Risk Factors and Warning Signs of Financial Exploitation

### RISK FACTORS

Any older adult can be a victim of financial exploitation. But the following circumstances, especially in combination, make people more vulnerable:

- Decreased physical health and mobility
- Cognitive impairment or even a subtle decline in mental acuity that leads to confusion and forgetfulness
- Social isolation
- Increased dependency on caregivers
- Being cared for by someone who has a substance abuse or mental health issue
- Being less familiar with new digital technologies

### WARNING SIGNS

#### Questionable Financial Transactions and Circumstances, including:

- Changes in banking patterns including but not limited to increased number of ATM transactions and large withdrawals from the person’s financial account(s)
- Suspicious signatures on withdrawal forms
- Amounts and signatures that seem to be written with different pens
- Missing bank statements, passbook(s) or checkbook(s)
- Concern by banking staff that in-person transactions might be coerced
- New bank loans or debts
- Closing accounts or cashing in CDs without concern about incurring penalties
- Sudden failure to pay rent or mortgage payments
- Other unpaid bills and mounting collection notices
- Missing funds
- Missing valuables
- New power of attorney

#### Suspicious Relationships, including:

- New friends or relatives who are suddenly spending a lot of time with the older person and appear overly interested in the person’s finances
- The older person is becoming increasingly isolated and dependent on a single relative, friend or professional caregiver
- A caregiver who doesn’t let the older person speak for him or herself
- The older person seems nervous around or afraid of a particular relative, friend or caregiver
- Someone who inexplicably gains control over the older person’s finances

#### Changes in the Older Person’s Demeanor or Condition, including:

- Concerns or confusion about finances, especially missing funds
- Incessant talk about needing more money
- Inability to remember making financial transactions or signing financial documents
- Offering implausible explanations about how money is spent
- Fears of eviction or being institutionalized
- Evidence of physical neglect

Adapted from *Broken Trust: Financial Exploitation and Power of Attorney Abuse*, published by the Brookdale Center for Healthy Aging.

## Under the Radar, but Widespread and Costly

When people think of elder abuse, they tend to think of physical abuse, but financial exploitation is actually the most common form of abuse. One of the best studies of prevalence to date, conducted in 2011, yielded self-reported rates of financial exploitation among New York State residents 60 years and older that were at least twice as high as any other type of abuse—physical/sexual, emotional or neglect.

Equally troubling, that same study also showed a wide discrepancy between self-reported rates of

victimization and estimates of prevalence based on the number of documented cases. While 42 people out of every 1,000 surveyed reported some kind of financial exploitation in the previous year, the rate of documented cases was less than 1 per 1,000.

Five years later, in June 2016, another study put a price tag on the cost of financial exploitation in New York State: an estimated \$1.5 billion annually in the form of stolen cash and property, investigative costs and benefits paid to victims.

### THE NUMBERS IN NEW YORK STATE

# 1 in 24

OLDER ADULTS ARE THE VICTIMS OF FINANCIAL EXPLOITATION



**\$ Financial Exploitation Costs an Estimated \$1.5 Billion Annually \$**



ONLY **1 in 44** CASES ARE REPORTED

## What Brooke Astor and Mickey Rooney Have in Common

Philanthropist-socialite Brooke Astor and beloved actor Mickey Rooney each amassed significant wealth over their lifetimes, and toward the end of their lives members of their own families stole much of it. In both cases, the perpetrators resorted to additional forms of abuse to facilitate and conceal their theft. If famous older adults with significant resources such as Brooke Astor and Mickey Rooney can be deeply harmed by the people closest to them, those who should protect them, certainly the risks for other vulnerable, less affluent older adults is great. Astor and Rooney's stories also show what's possible when individuals and systems come to the aid of those subjected to elder abuse.

With the help of an estate lawyer, Astor's only son tried to swindle millions of dollars that would have gone to charity by convincing his mother to change

her will long after she was diagnosed with Alzheimer's Disease. For years, he kept his mother shut away in her New York City apartment and strictly controlled her care. The abuse continued until his own son, Phillip Marshall, so alarmed by his grandmother's circumstances and suffering, petitioned for guardianship. Phillip Marshall prevailed and his father was eventually convicted of first-degree grand larceny.

Rooney's stepson, acting as his business manager, financially exploited the aging actor for a decade, years that should have been golden for Rooney. In testifying before Congress, a tearful Rooney described an "unbearable" life in which he was rendered powerless, not permitted "to make even the most basic decisions." Friends eventually came to his aid, and he recovered some of his assets through a civil lawsuit.

# The Aging Brain: Why Older Adults Are More Susceptible to Financial Exploitation

It's no secret that people change as they age. Far beyond wrinkles, normal aging is associated with a decline in a wide range of physical functioning. While the degree of change varies from person to person, the trend is universal. We see it in our parents and other older adults who are not as strong and steady as they were even a year or two ago.

A parallel decline tends to occur in cognitive functioning. Many people become less sharp and quick mentally as they age—changes that can be less apparent unless they manifest dramatically in the form of Alzheimer's Disease or other types of dementia. According to geriatrician Dr. Mark Lachs of Weill Cornell and The New York Presbyterian Health Care System, such normal declines in cognition render older adults more vulnerable to financial exploitation. Moreover, the simple fact that many older adults have savings and assets makes them targets. As Willie Sutton famously said, "I rob banks because that's where the money is."

Dr. Lachs and researcher S. Duke Han coined the term age-associated financial vulnerability, or AAFV for short. They define AAFV as a pattern of behavior on the part of the older adult that's inconsistent with previous financial decision-making. Such vulnerability is evidenced in a person who once made sound financial decisions but is now acting in an uncharacteristically sloppy, erratic, risky or even overly generous fashion with significant sums of money that could jeopardize the person's finances and overall wellbeing.

**The simple fact that many older adults have savings and assets makes them targets. As Willie Sutton famously said, "I rob banks because that's where the money is."**

The kind of normal cognitive declines that contribute to AAFV include: a reduced ability to multi-task and comprehend future ramifications of financial actions (executive dysfunction); the inability to quickly perform mental calculations (acalculia), especially to verify sums or other numerical values; and impulsivity (frontal disinhibition).

These changes in cognition can be exacerbated by a range of other factors associated with aging—from increased anxiety, to vision and hearing loss, to social alienation and depression. The result: People who already have difficulty making sound financial decisions are even less able to do so, particularly in situations where someone is trying to take advantage of them.

Research by Elizabeth Castle and others published by the National Academy of Sciences also shows that compared with younger people, a larger percentage of older adults are less able to recognize a characteristically untrustworthy face, which means they are more likely to trust people they shouldn't. This deficit is directly related to reduced functioning in the region of the brain that triggers the "gut feelings" of aversion and risk we've all experienced. And yet these same older adults test normal on scales designed to measure cognitive impairment.

Therein lies the rub: While age-associated financial vulnerability is real—Lachs refers to it as an "epidemic"—it's not diagnosed and captured in medical records. Lachs believes all professionals who routinely encounter older adults should be on the lookout for and responsive to AAFV. "We cannot infantilize older adults who have the same rights as all of us," he says, "but older adults are at risk of AAFV and need protection. History will judge those who were on the right side of this issue as courageous. Twenty years from now we will look back on our failure to protect the assets of vulnerable older adults with astonishment."

**THE TAKE-AWAY:** As legal professionals, be aware that you are likely to encounter older adults with cognitive deficits and resulting financial vulnerabilities that lie outside the scope of a clinical diagnosis of Alzheimer's Disease or other diagnosed impairment. An understanding of the capacities and needs of older adults involved in guardianship proceedings and in cases of actual or suspected financial exploitation is essential.



## Common Stranger Scams

Someone posing as an IRS agent calls asking for your social security number. The person sounds official, so you provide the number and, just like that, you're the victim of identity theft. Or you receive an email that appears to be from your bank asking you to reset your password and comply because the logo looks so convincing. Your account and personal information are now compromised. A pop-up window warns of a virus detected on your computer. You call the tech support number provided and give your credit card number in exchange for help. You've just been the victim of a fraud. Other common scams include fake lotteries, Ponzi schemes and other investment hustles, and a wide array of home improvement swindles—such as the new asphalt driveway that washes away the next time it rains. People of all ages fall prey to cons such as these, but older adults are particularly vulnerable because they tend to be more trusting and less aware of the risks.

Some con artists even tailor scams to “appeal” specifically to seniors, such as the one that targets grandparents. With the proliferation online of photos and other personal information, scammers are poised to pose as someone's grandchild. When “Luke” calls,

saying his car broke down and needs \$1,000 to pay the mechanic—and adds “Don't tell my parents because I drove to Canada for a concert and they don't know”—the grandparent on the other end of the line often complies. As banks and Western Union caught on, the thieves got creative: asking for chain store gift cards or instant credit cards instead of cash.

Online relationships, such as on Facebook, which are becoming more common among older adults, are also fruitful terrain for financial exploitation: People want to believe that love and affection are real. Older adults are not only more likely to be targeted, they are less likely to report the scam. Many worry that their relatives—and by extension the courts—will use the information against them, as a sign that they can't be trusted to make their own decisions or to live independently.

The challenge is to protect and empower older adults. For more information about the anatomy of a scam, safety precautions, and where to report scams, see *Smart Seniors* and *Smart Seniors: Smart Investors*, both available from the New York State Attorney General's Office at [www.ag.ny.gov](http://www.ag.ny.gov).





# In Your Court: What Judges Can Do to Protect Older Adults

## An interview with Deborah A. Kaplan, Statewide Coordinating Judge for Family Violence Cases

### 1. What were your early experiences as a sitting judge handling cases that involved financial exploitation of an older adult?

Early on in my judicial career, I presided over a drug treatment court where I often encountered defendants who had stolen money from an older family member, usually a parent or grandparent, to fund their addiction. At that time, I did not know about the prevalence of elder abuse, or the fact that more than half of all perpetrators are family members. Since then, I've also learned that for every single reported case of elder abuse there are many more cases that never come to light. As in society at large, many of us working within the legal system don't always immediately recognize the signs of elder abuse, especially the numerous indicators of financial exploitation.



### 2. How does ageism come into play, and how do you avoid succumbing to common stereotypes about older adults?

Unfortunately, in our youth-oriented society older adults can be invisible, and stereotypical, ageist attitudes abound. Either consciously or not, people frequently assume that all older adults are frail, mentally incompetent, unproductive, and out of touch, which leads to a lack of respect. According to the World Health Organization, the lowest levels of respect are reported in countries with the highest incomes, including the United States. Being routinely subjected to these negative stereotypes has a pronounced and detrimental effect on older people.

Simply because someone is of advanced age, does not mean that his or her hearing, sight, intellect, memory or mental capacity is impaired. People age at different rates and in different ways. Just because someone takes a bit longer to respond to a question does not necessarily mean the person has cognitive deficits. As a judge, I evaluate each case on its own set of facts and circumstances.

On the other hand, there are realities of aging that I believe are important for judges and courts to consider and, when necessary, to accommodate. For example, it can be more challenging for older adults to fully participate in court proceedings. We can all

take simple measures, such as adjusting the timing of a court calendar, taking more frequent recesses, or making assisted listening devices available to help older litigants fully participate in the process. I urge you to review the tips for accommodating older litigants on page 11.

### 3. What are some of the most difficult or complex dynamics arising in cases involving financial exploitation?

There are many. Let me just highlight a few.

First, even if an older adult is fully aware that he or she has been financially exploited, an array of defensive responses can occur. Shame, which is a powerful and common response to victimization at any age, can be especially salient for older adults in our ageist society.

I've learned from long-time prosecutor Arlene Markarian that if the perpetrator is someone with whom the older adult has an ongoing relationship, that bond, even when violated, will influence how the victim responds. Victims may want to protect someone they know and love, especially if the potential punishment is harsh, such as incarceration, or they may fear retaliation by someone with easy access to them. Some older victims are reluctant to sever a relationship with someone they depend on for physical care or emotional support, often because they are afraid of ending up in a nursing home. Judges need to understand these dynamics and be able to connect older adults with emergency shelter and other services, such as those provided by The Harry and Jeanette Weinberg Center for Elder Abuse Prevention.

One of the most vexing situations I've encountered is when a perpetrator is able to bend an older adult's will to meet his or her nefarious objectives. This type of manipulation is usually wrapped in declarations of love, affection and friendship but can also involve threats or coercion. Victims in these cases often present as willing participants. Courts can support a finding of undue influence by carefully considering evidence that shows one or more of the following: deterioration in the older adult's physical or mental health, current financial decisions that deviate substantially from past decision-making, a trend of increased dependence on the alleged abuser, signs

that the older person was isolated from close family members when he or she executed the questionable financial transactions, and proof that the attorney who drafted the will, deed, power of attorney or other financial instrument is someone with whom the older person was previously unfamiliar.

Another tricky area involves assessing an older adult's cognitive capacity, either to substantiate allegations of financial exploitation or to safeguard the person's assets in the future. I urge you to read the section beginning on page 12 to learn more about this crucial area of legal practice.

Given the complexities inherent in financial exploitation cases, some of which I have enumerated, as a society we need to identify and prevent exploitation early on. Toward that goal, the NYS Office of Family and Children's Services and Department of Financial Services are training financial institutions and APS workers statewide about steps they can take to prevent financial exploitation. My office also is committed to offering ongoing training to judges, court personnel and the larger community about financial exploitation of older adults, as well as on other issues impacting on the welfare of some of our most vulnerable citizens.

#### **4. What should judges keep in mind regardless of the type of court in which they sit?**

Most important, become familiar with the warning signs of financial exploitation and who's most at risk, both of which are enumerated on page 5.

It's also important to tailor solutions to the individual circumstances in a case. Criminal courts routinely issue orders of protection, order restitution, and/or require ongoing judicial monitoring. Civil courts award damages, rescind contracts, deeds and other legal documents, and issue restraining orders. In exercising these and other legal options, judges must skillfully craft resolutions that meet multiple goals: recognize and remedy any harm done; protect the older adult from future exploitation; preserve his or her independence; and allow for a continued relationship, albeit modified, between victim and abuser if that's what the victim wants and is capable of choosing. In many cases, achieving these ends may entail connecting both parties with appropriate services in the community. Ensuring procedural fairness and due process at every stage of the proceedings is, of course, also crucial.

Some older adults will need ongoing assistance to safeguard their assets. In some cases, Adult Protective Services can take over certain bill paying functions. In other cases, the appointment

of a guardian ad litem pursuant to CPLR §1201 or a guardianship pursuant to Mental Hygiene Law Article 81 will be appropriate. In appointing guardians, courts should tailor the guardian's scope of authority to fit the older adult's needs and circumstances, always striving to preserve as much independence as the person can manage.

#### **5. People often talk about the need for collaboration. What does collaboration look like in practice?**

Our judicial system has extensive experience in applying a problem-solving approach to cases where the issues are both social and legal. We've developed successful drug courts, domestic violence courts, and most recently mental health courts that engage community stakeholders in reaching resolutions that work for all parties involved. We need to include community stakeholders in a similar way to resolve cases involving financial exploitation of older adults.

Community partners assist courts by assessing mental, physical and other conditions that are relevant to the legal matters before the court, supporting older victims throughout the court process so that they can be full participants, and helping to craft remedies and interventions that meet victims' needs during the court case and long after it's resolved.

When I was appointed Statewide Coordinating Judge for Family Violence Cases, I immediately convened a diverse working group to address issues of elder justice and elder abuse. It's comprised of nonprofit service providers, government agencies, academics, mediators, medical professionals, social workers, law enforcement, prosecutors, legal services attorneys and other members of the bench and bar. That group—The New York State Judicial Committee on Elder Justice—is now a standing committee of the courts. With the support of our exceptional and dynamic Chief Judge, Janet DiFiore, and Chief Administrative Judge Lawrence K. Marks, we're striving to ensure that all court personnel are aware of and responsive to the needs of the older adults we serve.

**KEY RESOURCE:** A training curriculum on elder abuse specifically for state judges is available from The National Center for State Courts. To access it, visit [www.eldersandcourts.org](http://www.eldersandcourts.org). Additional educational resources can be found on our office's webpages at <http://www.nycourts.gov/courts/family-violence/index.shtml> and <http://inside-ucs.org/courts/family-violence/index.shtml> (OCA users only).

# Tips for Handling Matters Involving Older, Vulnerable Litigants

## COURTROOM ACCOMMODATIONS

- Familiarize older litigants with the seating arrangements in the courtroom and the roles of the court staff.
- Check that pathways leading to where the older person will sit are clear.
- If the older person will take the witness stand, make sure there are no obstacles in his or her way, and if there is a step up to the stand, point it out.
- Background noise should be minimized to the extent possible and lighting increased if possible.

## ADJUSTMENTS IN THE PROCESS

- Explain to older litigants how their case will proceed and how long the case is expected to take.
- Make efforts to be flexible in calendaring cases involving older litigants to accommodate medical needs and/or fluctuations in capacity and mental alertness.

- Consider the duration of each hearing and schedule a sufficient number of breaks so that an older litigant can, if necessary, take medication, go to the bathroom, and eat or drink something.
- Avoid delays in cases involving older litigants. If a delay is unavoidable, the reason for it should be clearly explained.
- Don't raise the volume of your voice in an attempt to compensate for perceived hearing loss, but do reduce background noise and speak slowly and distinctly; assistive listening devices may be helpful.
- When speaking to the older person, try to position yourself at eye level.
- Allow an aide, nurse or companion to be seated beside or close to the older litigant if the litigant wishes.
- Format documents in larger print whenever possible.



# Assessing Capacity, Legally and Medically

One question looms at the center of many legal cases involving older adults: Can the person appreciate the consequences of particular actions and make decisions in his or her own best interests? Assessing capacity can be essential to substantiating allegations of financial exploitation and taking legal steps to protect an older person from theft.

An older man, for example, who abruptly decides to give \$50,000 to his gardener has every right to do that, if he's making the choice freely, fully understands the consequences of his decision, and it doesn't jeopardize his finances. Proving otherwise is necessary to take legal measures to protect or recoup his assets and to prosecute the gardener if there's evidence of criminal conduct.

The law generally views capacity as task specific. Through this lens, it is possible for someone to have full capacity in one area of life—or for a particular task—but to lack capacity in another area of life. Prosecutors often rely on this understanding of capacity in building a criminal case against an alleged perpetrator of financial exploitation. An older adult may be able to manage daily tasks without assistance, but have a poor grasp of his or her finances and fail to understand the consequences of giving away a large sum of money.

The law outlines transaction-specific capacities that include: the capacity to contract, capacity to consent to marriage, testamentary capacity (i.e. to execute a will), donative capacity, capacity to execute a power of attorney, capacity to make healthcare decisions and capacity to testify. In each of these areas, competency (aka capacity) is presumed, and the person challenging it bears the burden of proving incompetence—proof that must be task and time specific. Going back to the example above, the inquiry would be, what was that older gentleman's state of mind when he made that \$50,000 gift? Was he wholly unable to comprehend and understand the nature of the transaction?

Writing in the *Matter of Kotick* (51 Misc3d 1231(A) [Sur Ct, New York County 2014]), the Court noted, “[A]s a general matter, neither physical impairment nor medical treatments, nor advanced age and eccentricity, nor even memory impairment by such conditions as Alzheimer’s disease, gives rise to a presumption of mental incapacity. . . . Facts bearing on decedent’s inability to wholly comprehend the nature of the transaction around the time of the transaction still must be provided.” Courts in numerous other decisions have reached similar conclusions.

Although the legal parameters are clear, the task of assessing capacity can still be difficult, and a medical diagnosis isn't definitive. According to Dr. Winston Chiong, a physician and researcher at the University of California, San Francisco, many people with a diagnosis of mild dementia can manage their own money, while some other older adults without dementia are unable to handle the same set of tasks.

Dr. Daniel Marson, an expert in Alzheimer’s Disease who is also a lawyer, agrees: “Diagnosis can never be the sole basis for a capacity judgment. It informs that decision. Lawyers have to look beyond diagnosis and even functional impairment to investigate specific decisions.” Marson also underscores that court rulings about an individual's capacity to make financial decisions can have repercussions later on in situations where financial exploitation is suspected.

To further complicate matters, an older person's capacity for making decisions, financial and otherwise, may fluctuate with the time of day, use of medication, and in response to a number of other factors, including lack of sleep, malnutrition, alcohol intake, stress, and bereavement or other life trauma. There are also mitigating physical conditions, most notably hearing and vision loss that can make older people appear to be cognitively impaired when, in fact, they are not. One bad decision could be an important warning sign of the onset of dementia or a passing problem that can be managed.

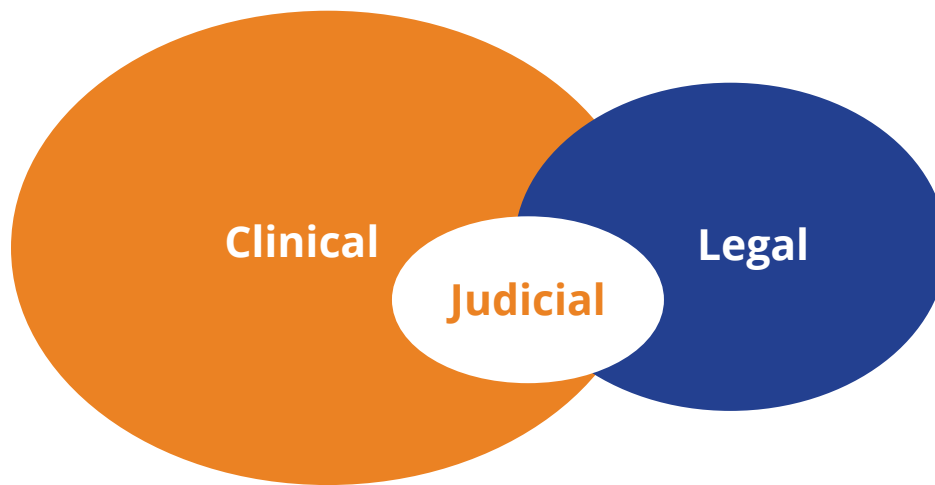
In sum, understanding why someone would give \$50,000 to his gardener and responding appropriately—both to this concerning event and more generally—is not easy. It likely will take time and require input from both specially trained clinicians and legal professionals. The matter should be investigated carefully, avoiding a rush to judgment, because so much hangs in the balance: not only the older adult's assets and financial health, but also his or her independence and dignity.



**THE TAKE-AWAY:** Financial capacity, generally speaking, is the ability to manage money and other assets in a way that meets an individual's own needs and serves his or her best interests. It encompasses skills, such as the ability to calculate numbers, and good judgment. But this general definition is just the starting point for evaluating whether an older adult can make particular financial decisions and what circumstances might enhance or diminish that ability.

Lawyers and judges are often left wondering, "How can I assess cognitive capacity? I'm not a doctor." Specially trained healthcare professionals often feel the same: "How can I assess capacity in the context of a court case? I'm not a lawyer." The obvious answer is that the two professions need to work together. The good news is that while medical and mental health models have traditionally viewed cognitive capacity with an eye toward diagnosing a condition as opposed to evaluating discrete practical abilities, that is shifting.

## Overlapping Assessments of Capacity



**Courts are called upon to provide the most narrow assessment of capacity.**

*Adapted from a presentation by Daniel Marson, Ph.D., J.D. at the Judicial Symposium on Financial Exploitation of Older Adults, White Plains, New York, May 1, 2017.*

## Protecting and Supporting in Equal Measure

If a person's cognitive capacity is significantly diminished, courts have the authority to take actions on the person's behalf that they wouldn't have otherwise, most notably to appoint a legal guardian to make financial and perhaps other decisions for the person. Guardians can be essential to protecting older adults from theft and other abuse, but guardians can be overbearing in ways that disempower older adults and can become abusive themselves.

Edwin Walker, Deputy Assistant for Aging at the federal Administration for Community Living, believes there should be "more zealous defense" of older adults in proceedings that involve the possible appointment of legal guardians.

This should involve careful vetting of any potential guardian, and a willingness to remove abusive guardians. In addition, according to Walker, judges should be more open to alternatives to full guardianship.

"This is about helping older adults make better decisions for themselves," he emphasizes. Supported decision-making is a growing area of practice, both here in the United States and internationally. It's important not only from the perspective of fostering independent living, but also because here in New York and nationwide there simply aren't enough guardians to meet the need, especially for older adults with very limited financial resources.

**KEY RESOURCE:** An Action Tool on Court Assessment of Individual Abilities & Limitations developed by the ABA Commission on Law and Aging/WINGS (Working Interdisciplinary Networks of Guardianship Stakeholders) can be found at: [www.americanbar.org/groups/law\\_aging/resources/wings-court-stakeholder-partnerships/project-tools.html](http://www.americanbar.org/groups/law_aging/resources/wings-court-stakeholder-partnerships/project-tools.html)



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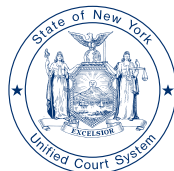
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Older adults are valued members of our communities, entitled to the same rights and protections as anyone else. As legal professionals we're often called upon to protect vulnerable older members of our communities or to uphold their right to make life decisions—and often to do both—in complex cases in which the stakes are high.

OFFICE OF THE STATEWIDE COORDINATING JUDGE FOR  
FAMILY VIOLENCE CASES



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